TABLE OF CONTENTS

	Page
MOTION OF NOOTER CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*	1
CONSENT TO FILING OF *AMICUS CURIAE* BRIEF	4
BRIEF OF NOOTER CORPORATION AS *AMICUS CURIAE*	5
QUESTION PRESENTED	5
FACTUAL BACKGROUND RELATING TO THE INTEREST OF THE *AMICUS CURIAE* IN THIS CASE	6
SUMMARY OF ARGUMENT	8
ARGUMENT:	
By Limiting The Size Of Civil Juries To Six Persons Through Local Court Rule, The District Courts Fail To Preserve The Common Law Jury As Required By The Seventh Amendment, Exceed The Scope Of Their Rule-Making Authority, And Deny Litigants Substantive State Rights To Which They Are Entitled Under The Doctrine Of *Erie Railroad Co. v. Tompkins*	9
A. In suits at common law the Seventh Amendment requires that the district courts preserve the right to trial by a twelve man common law jury	9
B. The right to a jury trial is a substantive right and there is a substantive difference between a trial before a panel of six and a panel of twelve persons	14

C. The District Court had no authority to promulgate a local rule eliminating the defendant's right to a trial before a jury of twelve persons 16

D. The rule of *Erie Railroad Co. v. Tompkins* requires that the federal courts honor constitutional rights to a twelve man jury guaranteed by the State constitutions 21

CONCLUSION 29

TABLE OF CITATIONS

Cases:

American Publishing Company v. Fisher, 166 U.S. 464 (1897) 9

Baldwin v. New York, 399 U.S. 66 (1970) 13

Beacon Stores, Inc. v. Westover, 359 U.S. 500 (1959) 14

Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958) ..... *passim*

Capital Traction Co. v. Hof, 174 U.S. 1 (1899) 9, 23

Colgrove v. Battin, 456 F.2d 1379 (9th Cir. 1972) *cert.* granted Oct. 10, 1972, 41 U.S.L.W. 3166 ..... 2, 19

Copp v. Henniker, 55 N.H. 179 (1875) 23, 24

Daley v. Kennett, 75 N.H. 536, 78 A. 123 (1910) 29

Davis v. Dyer, 62 N.Y. 231 (1882) 29

Dice v. Akron C. & Y. R. Co., 342 U.S. 359 (1951) 18, 25

Douglas v. United States Fidelity and Guaranty Company, 81 N.H. 371, 127 A. 708 (1924) 22

Duncan v. Louisiana, 391 U.S. 145 (1968) 12, 13, 14

East Kingston v. Towle, 48 N.H. 64 (1868) 23

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) ..... *passim*

Hallahan v. Riley, 94 N.H. 338, 53 A.2d 431 (1947) 22

Hanna v. Plummer, 380 U.S. 460 (1965) 20, 26, 27

Herron v. Southern Pacific Co., 283 U.S. 91 (1931) 26

Miner v. Atlass, 363 U.S. 641 (1960) 3, 21

Minneapolis & St. L.R. Co. v. Bambolis, 241 U.S. 211 (1916) 13

Opinion of the Justices, 41 N.H. 550 (1860) 22, 23

Simler v. Conner, 372 U.S. 221 (1963) 14, 21, 26

Thompson v. Utah, 170 U.S. 343 (1898) 9

Williams v. Florida, 399 U.S. 78 (1970) ..... *passim*

Wilson v. Nooter Corporation, Case No. 72-1308 (1st Cir. 1972) ..... *passim*

Constitutional Provisions, Statutes and Rules:

Constitution of the United States
- Article I, §8 16
- Article III 9
- Sixth Amendment ..... *passim*
- Seventh Amendment ..... *passim*

Constitution of New Hampshire Part I, Art. 20 22

Federal Rules of Civil Procedure
- Rule 4(d)(1) 26
- Rule 38(a) 20
- Rule 48 20
- Rule 83 ..... 17, 19, 20

Rules of U.S. District Court for the District of New Hampshire, Rule 30 ..... 10, 19, 20

Rules of U.S. District Court for the District of Montana, Rule 13(d)(1) 10

28 U.S.C. §2071 ..... 3, 16, 17

28 U.S.C. §2072 ..... 3, 17, 18, 19

Other Authorities:

Adm. Office of U.S. Courts, Annual Report 1971 ..... 28, 29

Augelli, Six Member Juries, 3 Seton Hall L. Rev. 281 (1972) 28

Note, The Effect of Jury Size on the Probability of Conviction, 22 Case W. Res. L. Rev. 529 (1971) 15, 16

Reducing the Size of Juries, 5 U. Mich. J. L. Reform 87 (1971) 28

The Supreme Court, 1957 Term, 72 Harv. L. Rev. 77 (1958) 24

Zeisel, And Then There Were None: The Diminution of the Federal Jury, 38 Chi. L. Rev. 710 (1971) 15, 16

Zeisel, The Waning of the American Jury, 58 A.B.A.J. 367 (1972) 15, 29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1442

ROLAND V. COLGROVE,

Petitioner,

v.

HONORABLE JAMES F. BATTIN,
United States District Judge
for the District of Montana,
Billings Division,

Respondent.

MOTION OF NOOTER CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Nooter Corporation respectfully moves, pursuant to Rule 42 of the Rules of this Court, that it be granted leave to file the accompanying brief in this case as *amicus curiae.*

In support of its motion, the applicant Nooter Corporation states:

1. That the applicant has an interest in this case in that it has now pending in the Court of Appeals for the First Circuit an appeal from verdicts entered against it in the case of *Wilson v. Nooter Corporation*,* which case was tried to a six-man jury in the District Court for the District of New Hampshire. One of the questions presented by Nooter Corporation in that appeal is the validity of a local rule whereunder the United States District Court for the District of New Hampshire limited the size of the jury to six persons. This is the same question presented in the instant case with respect to a local rule in the District of Montana.

2. That under the Constitution of The State of New Hampshire, as construed by the New Hampshire Supreme Court, the applicant would have been entitled to a jury of twelve persons had the case of *Wilson v. Nooter Corporation* been tried in the courts of the State of New Hampshire.

3. That the applicant has reviewed the decision of the Ninth Circuit in this case, 456 F.2d 1379 (9th Cir. 1972). It has also reviewed the petitioner's Petition for a Writ of Certiorari and the Motion of International Association of Insurance Counsel for Leave to File Brief as *Amicus Curiae*. In substance, these indicate that the petitioner and the above-named *amicus curiae* propose to argue that a district court cannot by local rule restrict the size of the civil jury to six persons because:

(a) Such a rule is prohibited by the Seventh Amendment of the Constitution of the United States; and

---

*Case No. 72-1308 on the docket of the First Circuit Court of Appeals.

(b) Such a rule exceeds the scope of the rule-making authority of the district courts since it is a "basic procedural innovation" prohibited by *Miner v. Atlass*, 363 U.S. 641 (1960), is inconsistent with the Federal Rules of Civil Procedure, and is contrary to the terms of 28 U.S.C. §2071 and §28 U.S.C. §2072.

4. That argument on the points discussed on the preceeding paragraph may be inadequate.

5. That, to the appellant's best knowledge and belief, no party or *amicus* in this case will make the further argument that such a local rule cannot apply in a diversity case arising under state law where the parties would have a constitutional right to a twelve-man jury if the suit were tried in a state court.

6. That this Court's decision in *Byrd v. Blue Ridge Electrical Cooperative*, 356 U.S. 525 (1958) indicates that conflicts between state and federal jury policies are to be resolved by balancing the respective strengths of the competing policies.

7. That this Court should consider the extent to which its decision in this case may interfere with strong state policies and/or state constitutional rights.

8. That the petitioner has consented to the filing of a brief by this applicant. A copy of his consent is enclosed herewith. The respondent has refused to consent to the filing of the applicant's brief, but has advised the applicant by telephone that he will not object to the applicant's motion to file such a brief.

Respectfully submitted,

NOOTER CORPORATION
By Sulloway, Hollis, Godfrey & Soden

By _____
Its Attorneys

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1442

RICHARD V. COLGROVE,

Petitioner,

v.

HONORABLE JAMES F. BATTIN,
United States District Judge
for the District of Montana,
Billings Division,

Respondent.

CONSENT TO FILING OF AMICUS CURIAE BRIEF

The Petitioner, Richard V. Colgrove, hereby consents, pursuant to Rule 42 of the Supreme Court Rules, that Nooter Corporation may file an *amicus curiae* brief in this proceeding.

Richard V. Colgrove
By Lloyd J. Skedd

/s/_____
His Attorney

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1442

RICHARD V. COLGROVE,

Petitioner,

v.

HONORABLE JAMES F. BATTIN,
United States District Judge
for the District of Montana,
Billings Division,

Respondent.

BRIEF OF NOOTER CORPORATION AS *AMICUS CURIAE*

QUESTION PRESENTED

May a federal district court by local rule restrict the size of the jury in a diversity case to six persons, despite Seventh Amendment guarantees, statutory restrictions on the court's rule-making power, and a state constitutional guarantee of a twelve person jury.

FACTUAL BACKGROUND RELATING TO THE INTEREST OF *AMICUS CURIAE* IN THIS CASE

The *amicus curiae* Nooter Corporation (herein Nooter) has an interest in this case in that it has now pending in the Court of Appeals for the First Circuit an appeal in the case of *Wilson v. Nooter Corporation** which was tried to a six-man jury in the Federal District Court for the District of New Hampshire. The case of *Wilson v. Nooter Corporation* was a negligence action brought by a workman (Wilson) against a subcontractor (Nooter) for personal injuries sustained in an accident on a construction site. The accident was allegedly caused by the negligence of certain Nooter employees, including an alleged "borrowed servant" who was the operator of a crane owned by the general contractor but engaged at the time of the accident in performing a task for Nooter. After being sued by Wilson, Nooter brought a third-party complaint against the general contractor, The H.K. Ferguson Company (Ferguson), for indemnity on the theory that the plaintiff's injuries were caused by Ferguson's failure to operate the crane in a careful and workmanlike manner. Under New Hampshire law, the liability of Nooter to Wilson, the obligation of Ferguson to indemnify Nooter, and the amount of Wilson's damages, present questions for the jury.

Prior to trial the District Court informed counsel that it intended to impanel a six man jury in accordance with its local rule. Counsel for Nooter and for Ferguson both objected, but the Court proceeded to impanel a six man jury. At the conclusion of the evidence the Court

*Case No. 72-1308 on the Docket of the First Circuit Court of Appeals.

directed a verdict in favor of the plaintiff Wilson against Nooter, and in favor of the third-party defendant Ferguson against Nooter as to liability issues. The six-man jury determined damages.

As already mentioned, Nooter has appealed the case to the First Circuit. Broadly stated, one of the questions to be decided on that appeal is the same as that presented for decision in the instant case, that is, the validity of the local rule of the District Court providing for six-man civil juries. For reasons set forth in this brief, Nooter agrees with the petitioner that such rules are generally invalid and cannot be adopted in any District Court.

Nooter's appeal to the First Circuit raises at least one important additional issue which, to Nooter's best knowledge and belief, has not and will not be raised either by the parties or by the other *amicus* in this case. The issue in question exists because in New Hampshire there is a strong and well established state constitutional requirement of a twelve-man jury. As a result, the local rule of the New Hampshire District Court presents an obvious conflict with the state requirement and deprives litigants of a right which they enjoy under state law. Nooter's interest in the recent case is to apprise this Court that such a conflict can be presented by local rules like the one under consideration here. Moreover, Nooter believes that when this Court examines the conflict in question, it will decide that the District Court's rule should yield to the state constitutional requirement of a twelve-man jury.

SUMMARY OF ARGUMENT

This case requires this Court to decide whether the federal district courts can promulgate local rules which limit the size of civil jury panels in diversity cases to six persons. *Nooter* maintains in this brief (1) that by impaneling six man juries the federal district courts fail to provide common law jury trials as guaranteed by the Seventh Amendment of the federal constitution; (2) that there is a qualitative and substantive difference between a trial before a jury of six persons and a jury of twelve; (3) that Congress has not given the district courts authority to promulgate local rules denying litigants their right to a trial before a jury of twelve persons; and (4) that when litigants have a state constitutional right to a twelve-man jury, federal district courts must honor this right in a diversity case arising under state law and tried to a jury.

ARGUMENT

BY LIMITING THE SIZE OF CIVIL JURIES TO SIX PERSONS THROUGH LOCAL COURT RULE, THE DISTRICT COURTS FAIL TO PRESERVE THE COMMON LAW JURY AS REQUIRED BY THE SEVENTH AMENDMENT, EXCEED THE SCOPE OF THEIR RULE-MAKING AUTHORITY, AND DENY LITIGANTS SUBSTANTIVE STATE RIGHTS TO WHICH THEY ARE ENTITLED UNDER THE DOCTRINE OF *ERIE RAILROAD CO. V. TOMPKINS.*

A. In Suits at Common Law the Seventh Amendment Requires that the District Courts Preserve the Right to Trial by a Twelve-Man Common Law Jury.

Until the recent decision of this Court in *Williams v. Florida*, 399 U.S. 78 (1970) it was considered a settled constitutional rule that a jury trial in civil or criminal proceedings in the federal courts required a jury as known at common law, this is, a jury of twelve persons whose unanimous action is necessary for a verdict or conviction. *E.g. Capital Traction Co. v. Hof*, 174 U.S. 1 (1899); *American Publishing Company v. Fisher*, 166 U.S. 464 (1897); *Thompson v. Utah*, 170 U.S. 343 (1898). However, in *Williams, supra*, this Court upheld a conviction obtained by the State of Florida before a jury of six persons who were impaneled pursuant to a Florida statute providing for such juries in all but capital cases. The Court in *Williams* held that the "impartial jury" guaranteed by the Sixth Amendment "in all criminal prosecutions", and the right to a jury trial in criminal cases provided by Article III of the Constitution, do not require a twelve person panel.

In apparent reliance on the assumption that *Williams* can and should be extrapolated to cover civil as well as criminal juries, many federal district courts have enacted local rules limiting the size of civil jury panels to six persons. This case concerns such a rule which was adopted by the Federal District Court for the District of Montana, Billings Division. Local Rule 13(d)(1). This *amicus* has pending in the First Curcuit Court of Appeals an appeal based in part on the following similar local rule of the District Court for the District of New Hampshire.

> *Rule 30. Impaneling Trial Jury*
>
> (a) Number of Jurors and Initial Selection
>
> (1) In all civil cases, the jury shall consist of six members and the clerk shall select by lot the names of six persons to be drawn initially. (2) In all criminal cases, the jury shall consist of twelve members . . . .

By providing for six-man civil juries, the district courts have plainly misread the *Williams* case and miscalculated the extent to which that case changed the old rule insofar as civil juries and the Seventh Amendment are concerned. In point of fact, at footnote 30 of its opinion in *Williams*, this Court expressly stated:

> While much of our discussion in this case may be thought to bear equally on the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us; we do not decide whether, for example, additional references to the "common law" that occur in the Seventh Amendment might support a different interpretation. 399 U.S. at 92.

The *Williams* case should not, then, be taken as authorization for the use of six-man juries in civil cases.

As the footnote suggests, there is a critical distinction between the Sixth Amendment criminal jury and the Seventh Amendment civil jury. The Seventh Amendment provides: "In suits at *common law* . . . the right of trial by jury shall be *preserved*, and no fact tried by a jury . . . shall be otherwise examined in any court . . . than according to the rules of the *common law*." (emphasis supplied.) The Seventh Amendment refers twice to common law, and it further provides that the right to trial by jury shall be preserved.

The Sixth Amendment, on the other hand, provides only for an "impartial jury" in all criminal prosecutions. It contains no direct language making reference to common law standards, nor does it contain a requirement that "trial by jury shall be preserved". As the *Williams* opinion noted, these textual differences are explained by the special history of the Sixth Amendment. Certain proposed drafts of the Sixth Amendment differed from the final form of the Amendment in that they included proposed requirements of "unanimity for conviction" and "other accustomed requisites". The Framers could not agree that the criminal jury should be a pure common law jury, and this Court apparently concluded in *Williams* that these requirements were deleted in final text of the Sixth Amendment as the result of a compromise. 399 U.S. at 96. Their absence indicated to the Court that, in the case of the Sixth Amendment, a pure common law jury was not intended by the Framers.

> ". . . Where Congress wanted to leave no doubt that it was incorporating existing common law features of the jury system, it knew how to use express language to that effect. . . . And the Seventh Amendment, providing for jury trial in civil cases, explicitly added that "no fact tried by a jury, shall

be otherwise reexamined in any Court of the United States, than according to the rules of the common law." 399 U.S. at 97.

Thus, in holding the Sixth Amendment jury was not a pure common law jury, this Court emphasized that the final draft of that Amendment was a compromise in which certain references to common law requirements were intentionally omitted. This peculiar history does not affect the Seventh Amendment. Moreover, this history makes the Seventh Amendment's two references to "common law" and its requirement that the right to trial by jury be "preserved" seem especially significant when compared with the bare requirement of an "impartial jury" in the Sixth Amendment. Since the *Williams* decision relied in part on these textual differences between the Amendments and specifically pointed out that the Seventh Amendment illustrates that the Framers knew how to incorporate common law features when they wanted to do so, it indicates that the Seventh Amendment, unlike the Sixth, requires a common law jury. At the very least, when the foregoing is taken into consideration together with footnote 30, it is plain that this Court did not intend *Williams* to be taken as a license authorizing federal district courts to promulgate rules denying litigants their long-established Seventh Amendment right to twelve-man juries in civil cases.

Another critical distinction between the Sixth and Seventh Amendments is that in the context of the criminal jury the incorporation doctrine placed this Court under certain pressures not involved in the civil jury context. In this regard it is significant that the first sentence of Section II of the *Williams* decision, which deals with the jury question, refers to the case of *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan* it was held

that the Sixth Amendment is incorporated in the Fourteenth, and that for this reason state courts must provide a Sixth Amendment jury "in all criminal cases that—were they to be tried in federal court—would come within the Sixth Amendment's guarantee." *Williams, supra*, 399 U.S. at 86. As a result of *Duncan*, if the Sixth Amendment required a twelve-man jury, such a jury would be required in state courts. This would have invalidated local practices in many states which allow lesser crimes to be tried before juries not consistent with the strict Sixth Amendment standard. See *Baldwin v. New York*, 399 U.S. 66 (1970) involving the trial of misdemeanors in New York. Having decided *Duncan* imposing the Sixth Amendment on the states, but not wanting to disrupt existing practice unduly or to afflict the states with unmanageable new burdens, this Court resolved this dilemma in *Williams* by diluting the jury guarantee of the Sixth Amendment. See Mr. Justice Harlan's dissent in *Williams*, 399 U.S. at 117.

The local rules under consideration here, like the state procedure under consideration in *Williams*, can present an important problem because of the federal form of our government. The problem here presented is, however, unlike *Williams* in that the Seventh Amendment guarantee of a jury in civil cases has never been incorporated in the Fourteenth Amendment and is not binding on the states, which are at liberty to establish their own procedures for regulating civil trials in state courts. *Minneapolis & St. L.R. Co. v. Bambolis*, 241 U.S. 211 (1916). As a result, unlike in the Sixth Amendment context, no damage is done to existing state practice if it is held that the Seventh Amendment requires a twelve-man jury. On the contrary, as we shall see subsequently, significant damage to state practice will occur if the

federal district courts are allowed, in effect, to rewrite the Seventh Amendment and to provide jury panels of only six persons in civil cases. It is a strange irony that the district courts appear to be relying on *Williams*, which was intended to harmonize federal rights with state practice, when they promulgate local federal rules which can serve to frustrate the fundamental state right to a twelve-man jury panel. Instead of authorizing the local rules under consideration here, if anything *Williams* indicates that this Court has adopted a philosophy of federalism which is incompatible with the rules in question.

B. The Right to a Jury Trial Is a Substantive Right and There Is a Substantive Difference Between a Trial Before a Panel of Six and a Panel of Twelve.

A host of decisions by this Court, involving a variety of different factual situations and legal issues, makes it perfectly plain that the right to a jury trial is a fundamental and substantial right which will be zealously protected by this Court's policy favoring jury trials. See, *e.g.*, *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958); *Beacon Stores, Inc. v. Westover*, 359 U.S. 500 (1959); *Simler v. Conner*, 372 U.S. 221 (1963); *Duncan v. Louisiana*, 391 U.S. 145 (1968). If the right to a jury trial is so important, it logically follows that the right is lost if a trial is held before some fact finder qualitatively different from the traditional jury. In *Williams*, the Court indicated that in order to fulfill the qualitative requirements for the Sixth Amendment jury, the number of jurors would have to be large enough "to promote group deliberation, free from outside attempts of intimidation, and to provide a fair possibility for obtaining a representative cross section of the com-

munity". 399 U.S. at 100. The Court's decision that the six man jury was adequate for Sixth Amendment purposes rested in part on its conclusion that six persons could perform these functions as well as twelve, that "there is no discernible difference between the results reached by the two different-sized juries". 399 U.S. at 101.

In the period since *Williams*, commentators have examined this conclusion and found it erroneous. First, they have examined the authorities and "experiments" which the Court cited to support the view that the size of the jury does not materially affect the outcome of litigation. See footnote 48 of the Court's opinion in *Williams*. Analysis of the authorities cited by the Court reveals that none contain a serious empirical study of the consequences of changing the size of the jury. Instead, their conclusions are at best based on the impressions of certain selected and perhaps biased observers. Thus, the authorities upon which this Court relied in *Williams* are statistically unreliable and do not constitute valid support for the proposition for which they are cited. See Zeisel, And Then There Were None: The Diminution of the Federal Jury, 38 Chi. L. Rev. 710, 713-15 (1971); Zeisel, The Waning of the American Jury, 58 A.B.A.J. 367 (1972); Note, The Effect of Jury Size on the Probability of Conviction, 22 Case W. Res. L. Rev. 529, 535-36 (1971).

The three cited articles go beyond showing that the Court depended upon unreliable studies. By using statistical analysis they also show that, contrary to the Court's conclusion in *Williams*, reducing the size of the jury panel significantly reduces the capacity of the jury to represent minority viewpoints in the community. (A minority group comprising 10% of the population would

receive representation on 72% of twelve man jury panels, but only on 47% of six man jury panels.) In civil cases this reduction in the representative character of the jury will mean that wider variations of verdicts will be returned when a six-man jury is used than when a twelve-man jury is used. In lawyer's terms, this means that the six-man jury is the "gambler's" jury. If the state court provides a twelve-man jury, and the federal court a six-man jury, the federal court becomes the place to go for a longshot verdict or to exclude minority groups from the panel. Zeisel, 38 Chi. L. Rev. at 715-19; also see Note, 22 Case W. Res. L. Rev. at 547 discussing the differences in conviction probability before different sized juries.

Thus, statistical studies of the significance of reducing the size of the jury from twelve to six illustrate that the smaller jury will return results different in character from those returned by the full twelve-man jury. The change accomplished by the various district court rules under consideration here is, then, a fundamental and substantial one which could create a basis for forum shopping. Whatever the court may have concluded in *Williams*, these rules certainly result in a discernible change in the kind of justice received by civil litigants in federal court.

C. The District Court Had No Authority to Promulgate a Local Rule Eliminating the Defendant's Right to a Trial Before a Jury of Twelve Persons.

Under the authority of Article 1, Section 8 of the Constitution the Congress has authorized the district courts to "prescribe rules for the conduct of their business", but has required that such local rules be consistent with Acts of Congress and the rules of practice and procedure prescribed by the Supreme Court. 28

U.S.C. §2071. The Congress has also authorized this Court to prescribe general rules of "practice and procedure" in 28 U.S.C. §2072. The latter act, known as the Enabling Act, is the one pursuant to which this Court promulgated the Federal Rules of Civil Procedure. Federal Rule 83 also limits the rule-making authority of the district courts by prohibiting the district courts from making rules inconsistent with the Federal Rules.

The Enabling Act, as we shall see, imposes significant restrictions on the extent of this Court's rule-making power. Surely the federal district courts under their comparatively narrow grant authority to "prescribe rules for the conduct of their business", as limited by the prohibitions of 28 U.S.C. §2071 and Federal Rule 83, cannot have greater rule-making authority than that conferred by the Enabling Act. Moreover, the restrictions contained in the Act and the provisions of the Federal Rules of Civil Procedure make it perfectly plain that the federal district courts lack authority to provide for six-man jury trials by local rule.

The first three paragraphs of the Enabling Act provide in pertinent part as follows:

> §2072. Rules of Civil Procedure
>
> The Supreme Court shall have the power to prescribe, by general rules . . . the practice and procedure of the district courts . . . in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not

later than the first day of May, and until the expiration of ninety days after they have been thus reported.

The first two paragraphs of the Act are direct and unambiguous in what they allow and what they prohibit. The first paragraph allows this Court to regulate "practice and procedure" in the district courts. The second paragraph, to emphasize that the rule-making authority granted under the Act is procedural only, prohibits this Court from doing certain things under the guise of regulating procedure. First, the initial clause of the second paragraph of the Act prohibits the Court from abridging or modifying the substantive rights of litigants. As we have seen, the right to a trial by jury has been zealously protected by this Court whenever it has been thought to exist. It is a right guaranteed by the Federal Constitution and by the constitutions of most if not all of our states. It is fair to say that it is a "basic and fundamental feature of our system of federal jurisprudence." *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1951). As such, surely it must qualify as a substantive right within the meaning of the Enabling Act, and the first clause of the second paragraph of the Act, standing alone, should prohibit the abridgment, modification or elimination of this right by mere court rule.

The second clause of the second paragraph of the Enabling Act goes further in defining what the Supreme Court cannot do under its authority to regulate "practice and procedure." It states that any rule promulgated by the Court "shall preserve the right of jury trial as at common law *and* as declared by the Seventh Amendment." (emphasis added). Thus, the Enabling Act represents precisely the kind of legislation to which the Court referred in *Williams* to show that "where

Congress wanted to leave no doubt that it was incorporating existing common law features of the jury system, it knew how to use express language to that effect." 399 U.S. at 97. As a result, even if the Court should find that the Seventh Amendment no longer requires a common law jury, this does not mean that common law features can be disposed of by rule of court. The specific language of the Enabling Act forbids rules of court which would fail to preserve the common law jury, or which would abridge or modify litigants' substantive right to trial before such a jury.

The Ninth Circuit held in the instant case that the foregoing construction of the second clause of the second paragraph of the Enabling Act is incorrect, and that the purpose of this clause is to preserve the right to a jury trial "in those cases in which the right existed at common law." *Colgrove v. Battin*, 456 F.2d 1379, 1381 (9th Cir. 1972), *cert. granted* October 10, 1972, 41 U.S.L.W. 3166. The plain answer to this argument is that the Enabling Act does not say so and it could have said so had this been the intended meaning. Mere reference to the Seventh Amendment would have accomplished that result, but the statute goes further, adding the clause "and shall preserve the right of trial by jury as at common law." If this clause is to have any meaning at all, it must mean that the basic common law incidents of a jury are to be preserved, whatever restrictive interpretation might be placed on the Seventh Amendment.

The conclusion that the district courts lack authority to promulgate local rules like Rule 30 of the New Hampshire District Court is also required by the fact that the authority to make local rules like the one in issue here is regulated by Rule 83 F.R. Civ. P.. This rule only allows the district court to make "rules governing its

practice not inconsistent with . . . [the Federal Rules of Civil Procedure]". Yet local Rule 30 in question here is blatently inconsistent with the Federal Rules.

First, it is inconsistent with Rule 48, F.R. Civ. P., which expressly provides that the parties may stipulate that the jury "shall consist of any number less than twelve." Rule 48 would specifically authorize the parties to specify a jury of more than six (but less than twelve), yet local Rule 30 would preclude such a stipulation. Consequently, Rule 48 and local Rule 30 are inconsistent in precisely the way Rule 83 forbids. Local Rule 30 must, then, be invalid. Local Rule 30 is also plainly inconsistent with Rule 38(a) F.R. Civ. P., which provides that "the right of trial by jury as declared by the Seventh Amendment . . . or as given by any statute of the United States shall be preserved to the parties inviolate." Since this Court has never indicated that anything less than a twelve-man jury will satisfy the Seventh Amendment, and since the Enabling Act forbids court rules abridging or modifying substantive rights and requires that the common law jury be preserved, local Rule 30 is plainly inconsistent with rights which Federal Rule 38(a) preserved "to the parties inviolate". Again, it cannot stand in the face of the limitation on local rule-making authority contained in Rule 83.

A final reason why this Court should hold that the district court had no authority to promulgate local Rule 30 is that such a Rule results in a lack of uniformity within the federal system and an unstudied major change in practice. The Court has held that "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules." *Hanna v. Plummer*, 380 U.S. 460, 472 (1965). It has held that the rule-making powers are

designed to insure that procedural innovations not be made at the local level, but instead that they "shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Miner v. Atlass*, 363 U.S. 641, 650 (1960). Finally, the Court has held that uniformity of practice is demanded by the Seventh Amendment. *Simler v. Conner*, 372 U.S. 221, 222 (1963). Plainly, if the size of the jury can be determined by the particular whim of a district court judge, the right to a particular sized jury can vary from district to district and from time to time. This can hardly have been intended by Congress when it passed the Enabling Act which requires in paragraph two that the right to jury shall be preserved, and in paragraph three that changes in the rules shall be reported to Congress for review.

D. The rule of *Erie Railroad Co. v. Tompkins* requires that the federal courts honor constitutional rights to a twelve-man jury guaranteed by the State constitutions.

The doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), requires the federal courts in diversity cases to apply state rules of substantive law. The instant case is a diversity case in which the *Erie* rule applies. The case of *Wilson v. Nooter Corporation*, tried in the District Court for the District of New Hampshire and presently pending in the First Circuit, was also a diversity case. Since *Wilson v. Nooter Corporation* dramatically illustrates the *Erie* problem which can be presented by the kind of local rule under consideration here, this section of this brief will discuss the problem with

particular reference to that case. As we shall see, the principles of *Erie*, as elaborated by subsequent decisions of this Court, require that in cases like *Wilson v. Nooter Corporation* the federal courts must honor state constitutional guarantees of a twelve-man jury.

If *Wilson v. Nooter Corporation* had been tried in the New Hampshire state courts, plainly the parties would have been entitled to the protection of the Constitution of The State of New Hampshire which provides in Part I, Article 20 that "the parties have a right to a trial by jury and this method of procedure shall be held sacred. . . ." The New Hampshire Supreme Court has ruled that this guarantee of a jury trial in civil matters "is determined generally by the historical test of its use at common law," *Hallahan v. Riley*, 94 N.H. 338, 339, 53 A.2d 431 (1947), and that "the extent of the right to trial by jury is settled by ascertaining how it was used and practiced before 1784." *Douglas v. United States Fidelity and Guaranty Company*, 81 N.H. 371, 374, 127 A. 708 (1924). Furthermore, the New Hampshire Supreme Court has specifically held that usage at common law required a twelve-man jury.

> We regard it as a well settled and unquestionable rule of construction that the language used by the legislature, in the statutes enacted by them, and that used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted.
>
> The terms "jury", and "trial jury", are, and for ages have been well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense.

A jury for the trial of a cause was a body of twelve men, described as upright, well qualified and lawful men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor or against either party, duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them; who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them. *Opinion of the Justices*, 41 N.H. 550, 551 (1860), quoted with approval in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

And again:

"The trial by jury, secured to the subject by the constitution, is a trial according to the course of the common law, and the same in substance as that which was in use when the constitution was framed." *East Kingston v. Towle*, 48 N.H. 64. . . . A statute might be passed calling eleven men a jury, and declaring that a jury should consist of eleven men and no more, or that, if eleven out of twelve jurors could agree, they might return a verdict; but such a statute would be an infringement of the constitutional right of trial by jury, because such a trial must be "according to the course of the common law, and the same in substance as that which was in use when the constitution was framed;" and a trial by a jury of eleven men, or a trial with the verdict given by eleven men out of twelve, would not be a trial "according to the course of the common law", and would not be "the same

in substance as that which was in use when the constitution was framed." *Copp v. Henniker*, 55 N.H. 179, 193 (1875).

Thus, in New Hampshire it is clear that the constitution requires a twelve-man jury in civil cases. Any reduction in that number would constitute a substantive change in the right to trial by jury and would be prohibited by the state constitution. If, contrary to the various arguments advanced in earlier sections of this brief, this Court should find that district court rules can establish six-man juries in some states, this does not mean they can do so in a state like New Hampshire where there is a solidly established constitutional right to a twelve-man jury.

The leading case dealing with the question of the relation of the *Erie* rule to the right of trial by jury is *Byrd v. Blue Ridge Electrical Cooperative*, 356 U.S. 525 (1958). *Byrd* presented a question regarding the status of the plaintiff as an employee under the South Carolina Workmen's Compensation Statute. Under the applicable state rule, this question was one for the judge. However, in *Byrd* the Court held that the state rule should not be followed in the federal district court, but that instead the issue should be referred to the jury. In reaching its decision the Court indicated that determining whether to follow state or federal practice in this kind of case required a two-part analysis. See The Supreme Court, 1957 Term, 72 Harv. L. Rev. 77, 148-49 (1958). First, it was necessary to inquire whether the state practice was an "integral part" of the state created right. *Byrd, supra*, 356 U.S. at 536. Second, it was necessary to inquire whether the federal policy favoring jury decision should yield to the state rule "in the interest of furthering the

objective that the litigation should not come out one way in the federal court and another way in the state court." *Id.* at 538.

In *Byrd* the Court found that South Carolina had never stated any reason for its rule that the judge should decide the issue of statutory employment. *Id.* at 535. This rule was not then an "integral part" of the state created right. Also, the Court found that there is a "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." *Id.* at 538. Since there was no significant state policy but a strong countervailing federal policy, and since there was no certainty that there would be a difference in outcome if the federal policy were followed instead of the state rule, the *Byrd* court held that the federal rule should prevail.

In substance, the foregoing description of the *Byrd* case shows that the *Erie* question illustrated by the case of *Wilson v. Nooter Corporation* should be resolved by balancing state and federal policies. The same basic principles was also followed by the Court in the case of *Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359 (1951), cited in *Byrd*. The *Dice* case involved the question of whether in accordance with state practice an Ohio court could decide the question of fraud in the obtaining of a release in an F.E.L.A. case, or whether the matter had to be referred to a jury. The court held that the right to a jury trial was "too substantial a part" of the federally created right to yield to a state procedural policy. 342 U.S. at 363. Thus, *Dice* as well as *Byrd* recognizes that strong policies favoring jury trials should yield to procedural rules.

Certain cases may be cited for the proposition that the federal courts are bound to follow federal and not state jury practice. Among the cases which might be cited are *Herron v. Southern Pacific Co.*, 283 U.S. 91 (1931), and *Simler v. Conner*, 372 U.S. 221 (1963). What these cases establish, however, is that in federal court federal rules determine whether a matter is to be decided by the judge or by the jury. They hold that the special relationship between judge and jury in federal court is a matter to be determined by federal law, that "the function of the trial judge in a Federal court is not in any sense a local matter. . . ." *Herron, supra*, 283 U.S. at 94. These cases should not prevent this Court from holding that federal district courts must respect a state constitutional rule relating only to the number of jurors, if the state rule does not interfere with the allocation of function between judge and jury and does not disrupt federal practice. These cases are consistent with *Byrd* and do not create an inflexible rule that federal jury practice is to be determined without regard to the respective strengths of conflicting state and federal policies.

It should also be noted that the case of *Hanna v. Plummer*, 380 U.S. 460 (1965), does not establish a strict rule requiring this Court to uphold the rule of the local district court. In *Hanna*, it was held that Rule 4(d)(1) F.R. Civ. P., which authorizes service of process at the abode of the defendant, controls in federal court even if a state statute would require service in hand. The *Hanna* case is distinguished from the problem presented by this appeal first because *Hanna* involved a conflict between one of the Federal Rules of Civil Procedure and a state rule which was plainly procedural in nature, whereas this case involves a conflict between a local rule of a federal district court and a state constitutional right. Another

important distinction between the two cases is that in *Hanna* the court found that "the difference between the two rules would be of scant, if any, relevance to the choice of a forum." 380 U.S. at 469. Although in *Hanna* the competing state and federal rules were outcome-determinative in the strict sense since the case would have been dismissed if compliance with the state rule had been required, the Court found it more important that the competing rules were essentially "housekeeping" rules. As a result, following the federal rule would mechanically affect "the way in which process was served," *id.*, but it would not affect the character of justice received by the parties.

The *Erie* problem illustrated by *Wilson v. Nooter Corporation* is entirely different. The conflict in question is not between "housekeeping" rules. As we have seen, the representational quality of the jury is significantly changed by the local rule in question. Litigants seeking to exclude minority groups or hoping to obtain longshot verdicts can now be expected to opt for the federal court where their chances of achieving these goals are significantly better than in state court. The effect will be to downgrade the quality of justice received in the federal courts, to create an improper basis of forum selection, and to frustrate important state constitutional safeguards. Surely this result is not appropriate unless some substantial countervailing purpose is served.

Assuming then that the balancing test set forth in *Byrd* provides the appropriate way of resolving the *Erie* problem by the case *Wilson v. Nooter Corporation*, there can be no doubt that in that case the balance should be struck in favor of following the state practice. Consider first the state side of the balance sheet. A twelve-man

jury is a constitutional right in New Hampshire, and New Hampshire case law establishes that a reduction in size even to eleven men would be an unconstitutional substantive change in the jury. Moreover, the change to a six-man panel significantly detracts from the representational capacity of the panel and changes the nature of verdicts returned. The right to a trial before a jury of twelve is then an integral part of litigants' rights in this kind of case under New Hampshire law.

On the federal side of the balance sheet, the policies favoring a six-man jury are not strong. The reasons given for the rule include the argument that it would eliminate congestion on the court docket, see Reducing the Size of Juries, 5 U. Mich. J.L. Reform 87 (1971), and that the smaller jury would entail less administrative expense and inconvenience than the twelve-man jury. See Augelli, Six Member Juries, 3 Seton Hall L. Rev. 281, 287 (1972).

A study of the docket of the District Court for New Hampshire exposes the weakness of the first argument. The 1971 Annual Report of the Director, Administrative Office of the United States, shows that of the 217 cases on the court's docket as of June 30, 1971, 141 or 65% had been on the docket less than one year, and, of the remaining cases, 50 had been on the docket less than two years. Table C 6a, p. A22. Local Rule 30 of the Federal District Court for the District of New Hampshire did not become effective until September 1, 1971. Thus in the fiscal year prior to the effective date of Local Rule 30, there was no congestion problem making the rule in question necessary or appropriate. Furthermore, in the federal district court in New Hampshire jurors are examined on voir dire as a group by the judge. As a result, it is hard to see how reducing the size of the jury will significantly speed up trials. On the question of

expense, jury expense is not a significant fraction of the national judicial budget. Zeisel, The Waning of the American Jury, 58 A.B.A.J. 367, 370 (1971). Furthermore, the Annual Report mentioned above shows there were only twelve completed civil jury trials in the New Hampshire district court during the fiscal year 1970-71. Table C 7, p. A26. Certainly the expense of empaneling twelve-man juries for these few trials cannot create a serious budgeting problem.

Thus, in the case of *Wilson v. Nooter Corporation* the district court's local rule eliminates a state constitutional right which is an integral part of the right to jury trial in this kind of case at state law. It does so for no significant saving either of federal judicial time or money. Under New Hampshire law, "mere inconvenience is not a reason for refusing a jury trial in cases where the right is guaranteed by the constitution." *Davis v. Dyer*, 62 N.H. 231, 239 (1882), *Daley v. Kennett*, 75 N.H. 536, 540, 78 A. 123 (1910). Under these circumstances it is clear that the local rule should yield to state policy under the principles set forth by this Court in the *Byrd* case.

CONCLUSION

For the foregoing reasons Nooter Corporation respectfully prays that this Court rule as follows on this appeal:

(a) That the Court reverse the decision of the Ninth Circuit in the instant case and remand the case to the Ninth Circuit with instructions to issue the writ of mandamus requested by the petitioner; or

(b) If the Court decides to affirm the decision of the Ninth Circuit, that the Court make clear in its decision that local rules of the kind considered here should not be applied in diversity cases where there is a strong state constitutional right to a twelve-man jury; or

(c) If the Court decides to affirm the decision of the Ninth Circuit, but is unwilling to rule as requested in the preceding paragraph, that the Court expressly reserve this question for consideration in a case in which it is directly raised.

Respectfully submitted,

Nooter Corporation

By Sulloway Hollis Godfrey & Soden

By /s/ John C. Ransmeier
JOHN C. RANSMEIER

Its Attorneys